

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

FOR ONLINE PUBLICATION ONLY

JOHN SURGENT,
Petitioner,
- versus -
UNITED STATES OF AMERICA,
Respondent.

MEMORANDUM AND ORDER
09-cv-3506 (JG)

JOHN GLEESON, United States District Judge:

John Surgent has brought a *pro se* motion pursuant to Federal Rule of Civil Procedure 60(b) petitioning the Court to: (1) vacate his conviction for conspiracy to commit money laundering pursuant to Rule 60(b)(6) or resentence him on this conviction; (2) modify his Presentence Investigation Report (“PSR”); (3) order the government to produce discovery; (4) dismiss all of his convictions pursuant to Rule 60(b)(3); and (5) permit him to review all grand jury records. Notice of Motion, ECF No. 11.

Surgent alleges that the Court “failed to apply” *United States v. Garcia*, 587 F.3d 509 (2d Cir. 2009), at his December 18, 2009 habeas corpus proceeding, which, he argues, made *United States v. Cuellar*, 553 U.S. 550 (2008), “retroactive.” Grounds for Relief ¶ 1, ECF No. 11-1. According to Surgent, the Court therefore erred when it found that he was “procedurally barred from applying the *Cuellar* decision” in his 2255 motion. *Id.* at ¶ 2. However, even assuming this to be true, where a petitioner seeks relief via a successive petition relying on a new rule of constitutional law, AEDPA requires that the rule have been “made retroactive to cases on collateral review by the Supreme Court.” See 28 U.S.C. § 2244(b)(2)(a) (emphasis added). *Garcia* is a Second Circuit decision and thus does not warrant reopening Surgent’s habeas

petition under Rule 60(b).

The remaining claims are denied as outside the scope of Rule 60(b).

So ordered.

John Gleeson, U.S.D.J.

Dated: April 24, 2015
Brooklyn, New York